

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES R. MEEKER, d/b/a THE MEEKER  
VINEYARD,

Plaintiff,

v.

MARTIN MEEKER, AHLGREN VINEYARD,  
PELICAN RANCH WINERY, SANTA CRUZ  
MOUNTAIN VINEYARD, SAVANNAH-  
CHANELLE VINEYARDS, and DOES 1 through  
10, inclusive,

Defendants.

No. C 02-0741 JSW

**ORDER DENYING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT;  
DENYING PLAINTIFF’S CROSS-MOTION  
FOR SUMMARY JUDGMENT; DENYING  
PLAINTIFF’S MOTION TO STRIKE; AND  
GRANTING IN PART AND DENYING IN  
PART DEFENDANT’S OBJECTIONS TO  
EVIDENCE**

Now before the Court is the motion of defendants Martin Meeker, Ahlgren Vineyard, Pelican Ranch Winery, Santa Cruz Mountain Vineyard, and Savannah-Chanelle Vineyards (collectively, “Defendants”) for summary judgment, or in the alternative, for summary adjudication. Also before the Court is the cross-motion of plaintiff Charles R. Meeker d/b/a The Meeker Vineyard, (“Plaintiff”) for summary judgment, or in the alternative, for partial summary judgment. Also before the Court is Plaintiff’s objections to late-filed evidence and motion to strike Defendant’s Food and Beverage Study filed in conjunction with their reply to their motion for summary judgment. Lastly, before the Court is Defendant’s objections to evidence.

Having carefully reviewed the parties’ papers and considered their arguments and the relevant legal authority, and good cause appearing, the Court hereby DENIES Defendants’ motion for summary judgment and Plaintiff’s cross-motion for summary judgment on the ground that there remain genuine issues

1 of material fact still in dispute. The Court hereby DENIES Plaintiff's motion to strike Defendant's Study  
2 and GRANTS IN PART and DENIES IN PART Defendants' objections to the evidence.

### 3 BACKGROUND

4 This is an action for trademark infringement brought by Plaintiff Charles R. Meeker on behalf of his  
5 winery located in Dry Creek Valley, Healdsburg, California, against defendant Martin Meeker who is in the  
6 business of growing wine grapes in San Miguel, Paso Robles, California. The dispute revolves around the  
7 parties' use of the same name, the Meeker Vineyard, in conjunction with their respective businesses. The  
8 complaint states claims for common law trademark infringement, violations of the Lanham Act, fraud in the  
9 registration of Defendant Meeker's mark and related unfair business practices under the California Business  
10 and Professions Code.

### 11 ANALYSIS

#### 12 A. Legal Standard.

13 Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and  
14 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material  
15 fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue  
16 is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party.  
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect  
18 the outcome of the case. *Id.* at 248. "In considering a motion for summary judgment, the court may not  
19 weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most  
20 favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A principal  
21 purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims.  
22 *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).

23 The party moving for summary judgment bears the initial burden of identifying those portions of the  
24 pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Id.*  
25 at 323. Once the moving party meets this initial burden, the non-moving party must go beyond the  
26 pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial."  
27 Fed. R. Civ. P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that  
28 precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards*

1 *v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)) (stating that it is not a district court’s task to  
2 “scour the record in search of a genuine issue of triable fact”). If the non-moving party fails to make this  
3 showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

4 **B. General Principles.**

5 Section 43(a) of the Lanham Act makes actionable the deceptive and misleading use in commerce  
6 of “any word, term, name, symbol, or device” on any goods or in connection with any goods. 15 U.S.C. §  
7 1125(a). To state a claim for infringement under Section 43(a), a plaintiff must meet three basic elements:  
8 (1) distinctiveness; (2) nonfunctionality; and (3) likelihood of confusion.<sup>1</sup>

9 To be protected, a mark must be capable of distinguishing one’s goods from the goods of others; in  
10 other words, the mark must be distinctive. *See Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*,  
11 150 F.3d 1042, 1047 (9th Cir. 1998). Marks are classified in one of five categories of increasing  
12 distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, or (5) fanciful. *Id.* Descriptive  
13 marks define qualities or characteristics of a product in a straightforward way that requires no exercise of  
14 the imagination to be understood. *See id.* at 1047 n.8. Personal names are descriptive marks, entitled to  
15 protection so long as it acquires a recognized secondary meaning. *E. & J. Gallo Winery v. Gallo Cattle*  
16 *Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992); *E. & J. Gallo Winery v. Consorzio del Gallo Nero*, 782 F.  
17 Supp. 457, 462 (N.D. Cal. 1991). Descriptive marks are not inherently distinctive and so do not initially  
18 satisfy the distinctiveness element. However, descriptive marks can acquire distinctiveness if the public  
19 comes to associate the mark with a specific source. *Kendall-Jackson*, 150 F.3d at 1048. Acquired  
20 distinctiveness is referred to as secondary meaning which has been defined as “association, nothing more.”  
21 *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985). The basic element of  
22 secondary meaning is the “mental association by a substantial segment of consumers and potential  
23 consumers between the alleged mark and a single source of the product.” *Id.* (citations omitted).

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26 <sup>1</sup> Defendants’ contentions notwithstanding, registration is not a prerequisite for protection under  
27 Section 43(a). *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (noting that “§ 43(a)  
28 protects qualifying unregistered trademarks”); *see also GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199,  
1204 n.3 (9th Cir. 2000). However, courts look to the general principles qualifying a mark for registration  
under 15 U.S.C. § 1052 when determining whether an unregistered mark is protectable under § 43(a).  
*Kendall-Jackson*, 150 F.3d at 1047 n.7.

1 Factors considered in determining whether a secondary meaning has been achieved include: (1)  
2 whether actual purchasers of the product bearing the claimed trademark associate the trademark with the  
3 producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner  
4 of use of the claimed trademark, and (4) whether use of the claimed trademark has been exclusive. *Blue*  
5 *Bell*, 778 F.2d at 1358.

6 A product feature is functional and cannot serve as a trademark if the product feature is essential to  
7 the use or purpose of the article or if it affects the cost or quality of the article. *Kendall-Jackson*, 150 F.3d  
8 at 1048. The parties do not dispute that the mark at issue is non-functional.

9 The last element to qualify as a protectable mark is the most important element of all. *See Two*  
10 *Pesos*, 505 U.S. at 780. Under the Lanham Act, “the ultimate test is whether the public is likely to be  
11 deceived or confused by the similarity of the marks.” *Id.* Likelihood of confusion exists when customers  
12 viewing the mark would probably assume that the product is associated with the course of a different  
13 product identified by a similar mark. *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 845  
14 (9th Cir. 1987). Evidence of actual confusion is persuasive proof that future confusion is likely. *Id.* The  
15 law clearly establishes that actual confusion is an indicium of secondary meaning. *Adray v. Adry-Mart,*  
16 *Inc.*, 76 F.3d 984, 987 (9th Cir. 1996). Evidence that the defendant intentionally copied the plaintiff's  
17 mark is also persuasive proof of confusion and is entitled to great weight because a defendant is presumed  
18 to accomplish this purpose. *Fuddruckers*, 826 F.2d at 845.

19 The factors considered to determine whether there is likelihood of confusion include:  
20 (1) strength of the allegedly infringed mark, (2) proximity or relatedness of the goods, (3) similarity of the  
21 sight, sound, and meaning of the marks, (4) evidence of actual confusion, (5) degree to which the marketing  
22 channels converge, (6) type of the goods and degree of care consumers are likely to exercise in purchasing  
23 them, (7) intent of the defendant in selecting the allegedly infringing mark, and (8) likelihood that the parties  
24 will expand their product lines. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).  
25 The factors are intended to guide the court in assessing the basic question of likelihood of confusion.  
26 *Eclipse Assoc. Ltd. v. Data General Corp.*, 894 F.2d 1114, 1118 (9th Cir. 1990). The presence or  
27 absence of a particular factor does not necessarily drive the determination of likelihood of confusion. *E. &*  
28 *J. Gallo*, 967 F.2d at 1290-91.

1 “Whether confusion is likely is a factual determination woven into law.” *Blue Bell*, 778 F.2d at  
2 1356. Trial courts disfavor deciding trademark cases in summary judgment because the ultimate issue is so  
3 inherently factual. *Id.* at 1356 n.5. Additionally, the question of likelihood of confusion is routinely  
4 submitted for jury determination as a question of fact. *Id.*

5 **C. Cross Motions for Summary Judgment.**

6 On the issue of trademark infringement, defendant Martin Meeker and the defendant wineries move  
7 for summary judgment on the basis that Plaintiff cannot establish secondary meaning or likelihood of  
8 confusion as a matter of law. On his cross-motion for summary judgment, Plaintiff Charles Meeker  
9 contends that he is entitled to judgment as a matter of law on his claims for trademark infringement under  
10 the Lanham Act.

11 **1. Defendants' Contentions Regarding Secondary Meaning are Unfounded.**

12 First, Defendants contend that use of a personal surname is not protectable. However, while  
13 personal names used in trademarks are “not inherently distinctive, they are treated as strong marks upon a  
14 showing of secondary meaning.” *E. & J. Gallo*, 967 F.2d at 1291. Therefore, the central dispute is not  
15 the use of the Meeker surname, but rather whether the use of the surname has acquired a secondary  
16 meaning.

17 Second, Defendants contend that as a matter of law Plaintiff cannot prevail because he has failed to  
18 conduct a market survey. (*See* Defendants' Motion at 13.) Although it is true that expert market surveys  
19 are considered the best evidence of secondary meaning, surveys are not the only means to demonstrate the  
20 acquisition of secondary meaning. *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 822  
21 (9th Cir. 1996) (“survey evidence is only one of the most persuasive ways to prove secondary meaning,  
22 and not a requirement for such proof.”)

23 Third, Defendants contend that there can be no likelihood of confusion as a matter of law because  
24 the analysis applies only to related goods, and Plaintiff is a winery that sells wines to retailers and  
25 consumers, while Defendant Meeker is a grape grower, who sells grapes to wineries. (*See* Defendants'  
26 Motion at 10.) Related goods are those goods which, though not identical, are related in the minds of  
27 consumers. *In Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 152-53 (9th Cir.  
28 1963). Wines and wine grapes are complementary items, brought to the market through the same channels

1 of trade, advertised in similar media, and the final products compete directly and are used by the same  
2 consumers. The parties' products are therefore sufficiently related for purposes of trademark analysis.

3 **2. Secondary Meaning.**

4 Factors considered in determining whether a secondary meaning has been achieved include: (1)  
5 whether actual purchasers of the product bearing the claimed trademark associate the trademark with the  
6 producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner  
7 of use of the claimed trademark, and (4) whether use of the claimed trademark has been exclusive. *Blue*  
8 *Bell*, 778 F.2d at 1358.

9 **a. Actual Association.**

10 In his cross-motion for summary judgment, Plaintiff contends that wine is a product for which the  
11 identity of the maker is of paramount importance to the buying public primarily because the quality of the  
12 product is viewed as flowing from the maker rather the varietal. (Cross-Motion at 16, citing *Gallo Nero*,  
13 782 F. Supp. at 465.) However, without reference to any independent evidence, Plaintiff then asserts that  
14 the demand for his wine has increased steadily and his product enjoys substantial goodwill in the industry.  
15 (Cross-Motion at 17.) Plaintiff has failed to demonstrate that, as a matter of law, the general public  
16 associates the name of his vineyard with his distinctive wines.<sup>2</sup>

17 **b. Degree and Manner of Advertising.**

18 Plaintiff contends that he has engaged in a wide array of promotional events and advertising in  
19 targeted consumer and general publications. In addition, Plaintiff lists and attaches as evidence a number of  
20 reviews and accolades from wine periodicals and newspapers. (Cross-Motion at 17; Declaration of  
21 Charles Meeker ("C. Meeker Decl."), ¶¶ 9-14, Exh. B.) In addition, Plaintiff attaches his own declaration  
22 which states that in order to gain public recognition, Plaintiff has "depended first on wine quality and the  
23 resulting 'word-of-mouth' advertising, and secondarily on various promotional efforts," and has also  
24 engaged in promotional events and advertising. (C. Meeker Decl. ¶¶ 16-17, Exh. D.)

25 In examining whether a plaintiff's advertising efforts are sufficient to establish secondary meaning,  
26 the Court must "look at the advertising's amount, nature and geographical scope with an eye towards how  
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28 <sup>2</sup> The Court will address *infra* in further detail elements of association in the analysis of whether there exists a substantial likelihood of confusion.

likely the advertising is to expose a large number of the relevant consuming public to the use of the symbol as a trademark or trade name." *Japan Telecom v. Japan Telecom America*, 287 F.3d 866, 875 (9th Cir. 2002). "A large expenditure of money does not in itself create legally protectable rights. The test of secondary meaning is the effectiveness of the effort to create it." *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1383 (9th Cir. 1987).

Plaintiff provides merely a sample of his efforts to advertise. (C. Meeker Decl., ¶¶ 16-18, 40-45, 48-56, Exh. D.)<sup>3</sup> Plaintiff further contends that because wine is a specialized market in which consumers rely on the maker and the maker's reputation, his efforts to "create positive word of mouth, engender good reviews, win awards, and build national exposure and a reputation for making a distinctive style of wine" is sufficient to establish the effectiveness of his advertising and promotional efforts. (Cross-Motion Reply Br. at 8.) Defendants' contention that Plaintiff has failed to establish undisputed facts concerning the extent and efficacy of his advertising and promotional efforts is persuasive. The Court cannot determine as a matter of law that Plaintiff's efforts are sufficiently effective so as to make the necessary finding of secondary meaning as a matter of law.

**c. Length, Exclusivity and Manner of Use of Trademark.**

Plaintiff contends that he has used the Meeker Vineyards mark exclusively throughout the wine industry for at least twenty years, from the first release of Plaintiff's 1984 vintage until the current time. (Cross-Motion at 17; C. Meeker Decl., ¶¶ 2, 4, 6.) Defendants contend that Plaintiff has failed to provide evidence in support of secondary meaning because the analysis of whether secondary meaning attaches after a period of use depends on how, and not on how long, the plaintiff used his mark. (Cross-Motion Opp. at 15.) Although this factor does not independently establish the existence of secondary meaning, the Court does find that Plaintiff has proffered sufficient evidence to establish that his use of the Meeker Vineyards mark was exclusive for a period of time prior to Defendant Meeker's use of the same mark.

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<sup>3</sup> Defendants move to strike portions of Charles Meeker's declaration for lack of foundation. Defendants contend that the paragraphs concerning what the winery, as opposed to Charles Meeker as an individual, has done with regard to sending out promotional letters should be stricken. (Objections to Evidence at 3, citing *Japan Telecom*, 287 F.3d at 873-74.) However, because Plaintiff is a sole proprietor and has personal knowledge of the promotional letters that he was responsible for sending out, the Court finds that the subject paragraphs relating to Plaintiff's promotional efforts on behalf of his winery are admissible and DENIES those portions of Defendants' objections concerning Plaintiff's promotional and advertising efforts.

1 However, because Plaintiff has failed to demonstrate the requisite manner in which the mark has been used,  
2 and this factor therefore does not militate in favor of either party.

### 3                   **3.       Likelihood of Customer Confusion.**

4           The core element of trademark infringement is the likelihood of confusion, *i.e.*, whether the similarity  
5 of the marks is likely to confuse customers about the source of the products. *Academy of Motion Picture*  
6 *Arts and Sciences v. Creative House Promotions*, 944 F.2d 1446, 1454 (9th Cir. 1991). Likelihood of  
7 confusion is a mixed question of law and fact that is predominantly factual in nature. *E. & J. Gallo Winery*,  
8 967 F.2d at 1290. The factors this Court must apply to determine the likelihood of confusion are  
9 enumerated in *Sleekcraft* and no single factor is singularly determinative. *Sleekcraft*, 599 F.2d at 348-49.  
10 The factors considered to determine whether there is likelihood of confusion include: (1) strength of the  
11 allegedly infringed mark, (2) proximity or relatedness of the goods, (3) similarity of the sight, sound, and  
12 meaning of the marks, (4) evidence of actual confusion, (5) degree to which the marketing channels  
13 converge, (6) type of the goods and degree of care consumers are likely to exercise in purchasing them, (7)  
14 intent of the defendant in selecting the allegedly infringing mark, and (8) likelihood that the parties will  
15 expand their product lines. *Sleekcraft*, 599 F.2d at 348-49.

#### 16                   **a.       Strength of the Mark.**

17           Trademark law offers greater protection for marks that are stronger or more distinctive. While  
18 personal names used as trademarks are not inherently distinctive, they are treated as trademarks upon a  
19 showing of secondary meaning. *E. & J. Gallo Winery*, 967 F.2d at 1291. The parties dispute the strength  
20 of Plaintiff's mark. While Defendants wrongly contend that Plaintiff cannot maintain any trademark  
21 protection, Plaintiff has at this juncture failed to demonstrate definitively that his use of the mark is long and  
22 continued, that it enjoys widespread, national public recognition or that the winery has engaged extensive  
23 and expensive advertising and promotion of its products bearing the mark.

#### 24                   **b.       Proximity or Relatedness of Goods.**

25           Where goods are related or complementary, the danger of consumer confusion is heightened.  
26 *Sleekcraft*, 599 F.2d at 350. Defendants contend that the parties' products are not related goods and do  
27 not directly compete because one sells wine to retailers and consumers, and one sells wine grapes to  
28 wineries. (Motion at 15.) However, as Defendants point out, the likelihood of confusion analysis applies



1 where "goods which would reasonably be thought by the buying public to come from the same source, or  
2 thought to be affiliated with, connected with, or sponsored by, the trademark owner." (Motion at 10, citing  
3 *The Network Network v. CBS, Inc.*, 2000 U.S. Dist. LEXIS 4751 (C.D. Cal. 2000).) Plaintiff Meeker  
4 produces both grapes and wines; Defendant Meeker grows and harvests grapes and has also produced  
5 wine. The businesses are certainly related and, in the final tally, the result is a bottle of wine sold to the  
6 consuming public. There is a distinct possibility that a consumer might be confused as to the proper source  
7 of the contents of the final bottle of wine. Accordingly, this factor weighs in favor of Plaintiff Meeker.

8 **c. Similarity in Sight, Sound, and Meaning of Mark.**

9 In analyzing the similarity of the marks, the Court must view the marks as a whole, as they appear in  
10 the marketplace. *E. & J. Gallo Winery*, 967 F.2d at 1291. The key elements of the marks are their sight,  
11 sounds, and meaning, and similarities in these characteristics "weigh more heavily than differences."  
12 *Sleekcraft*, 599 F.2d at 351.

13 Defendants contend that the marks are substantially dissimilar because Defendant Meeker's name is  
14 most often used in conjunction with the words "Paso Robles" and is always listed after the name of the  
15 vineyard using Defendant's grapes, the marks do not appear in the same magazine or articles and the  
16 design, style and color of the arrangement of the mark is different. (Motion at 14.) In addition, Defendant  
17 Meeker contends that there is no meaning of the mark itself, as it is only a surname and holds no  
18 independent meaning. (Opp. Br. at 20.) Plaintiff Meeker contends that the marks are identical and that in  
19 the context of wine labels, facially distinctive labels and the addition of other terms are insufficient to prevent  
20 confusion. (Opp. Br. at 11, citing *Gallo Nero*, 782 F. Supp. at 463-64.) Even where the subject marks  
21 are identical, "their similarity must be considered in light of the way the marks are encountered in the  
22 marketplace and the circumstances surrounding the[ir] purchase." *Lindy Pen Co. v. Bic Pen Corp.*, 725  
23 F.2d 1240, 1245 (9th Cir. 1984).

24 The mark used by both parties is, in fact, identical. The meaning of the marks is identical: both  
25 indicate the production of wine (and/or wine grapes) from a particular vineyard owned by someone by the  
26 name of Meeker. However, it is still unclear, and certainly disputed between the parties, whether the mark,  
27 as encountered in the marketplace is confusingly similar in sight and sound. There is simply not enough  
28 evidence in the record to determine at this stage how the mark is encountered as a whole in the

1 marketplace. Therefore, although the meaning of the mark is indeed identical, the sight and sound of the  
2 mark is still disputed.

3 **d. Actual Confusion.**

4 Evidence of actual confusion is relevant to the issue of likelihood of confusion, but the absence of  
5 such evidence does not necessarily create an inference that there is no likelihood of confusion. *Blue Bell*,  
6 778 F.2d at 1360 n.10. "Evidence of actual confusion is strong evidence of likelihood of confusion, but it is  
7 not determinative." *Sleekcraft*, 599 F.2d at 1219. Questions regarding affiliation is inconclusive evidence  
8 of confusion. *Miss World, Ltd. v. Mrs. America Pageant, Inc.*, 856 F.2d 1445, 1451 (9th Cir. 1988).

9 Defendants contend that there is no evidence of actual confusion and the only de minimus confusion  
10 is a series of several e-mails related to Defendant Meeker's website, despite the fact that Defendant's site  
11 has a clear disclaimer that it is not related to Plaintiff's winery. (Motion at 17.) Plaintiff contends that there  
12 is evidence of misdirected mailings in the form of bills and invoices, misdirected e-mails, misdirected  
13 telephone calls, oral incidents of confusion, and confusion by website wine reviewers. (Opp. Br. at 16;  
14 Cross-Motion at 9, 21.) In his cross-motion for summary judgment, Plaintiff Meeker attaches evidence of  
15 apparent confusion as well as his own declaration to the effect that people had expressed their confusion  
16 regarding the relationship between the two Meeker Vineyards. (See C. Meeker Decl. ¶¶ 30-37, Exh. H.)  
17 The evidence attached to Plaintiff Meeker's declaration consists of three unknown persons indicating that  
18 they were apparently confused by the two wineries' websites, three misdirected invoices, a few notes from  
19 Plaintiff himself about other unknown person's apparent confusion, and a number of misdirected e-mails.

20 Defendants object and move to strike those portions of Plaintiff Meeker's declaration regarding  
21 alleged actual confusion on the basis that those paragraphs lack foundation and constitute inadmissible  
22 hearsay. (Objections to Evidence at 3.) Defendants contend that the declaration attempts to state what a  
23 third party said, without the third party declaring or confirming the truth of the matter asserted. Plaintiff  
24 responds by claiming that the content of the alleged hearsay statements are not introduced for the truth of  
25 the matter asserted, but rather are simply reiterations of questions posed directly to Plaintiff himself. (Opp.  
26 to Objections to Evidence at 3.) Plaintiff argues that questions cannot themselves be introduced for the  
27 truth of the matter asserted and are therefore not inadmissible hearsay. However, Plaintiff is introducing the  
28 statements of several unidentified persons for the purpose of proving the truth that each was confused by

1 the two vineyards' identical names. The use of this evidence, in this manner, constitutes inadmissible  
2 hearsay and is stricken. In addition, there is little foundation for the introduction of the alleged statements of  
3 unknown persons.<sup>4</sup> The central issue in this matter is whether or not potential consumers or members of  
4 the *public* are, or could potentially be, confused by the similarity of the marks in the same industry.  
5 Although the Court finds that Plaintiff Meeker may be able to demonstrate actual or potential confusion, the  
6 record in this case is insufficient to prove actual confusion as a matter of law. The issue remains one of  
7 disputed fact.

8 **e. Marketing Channels.**

9 Defendant Meeker contends that he does not advertise to the public or to retailers and instead, that  
10 his business is targeted toward a small select group of winemakers. (Motion at 16.) Plaintiff Meeker  
11 contends that the California Association of Winegrape Growers, whose listing is proffered by Defendants  
12 as an exhibit to their motion, names both wineries in the same market. (Opp. Br. at 14.) Further, Plaintiff  
13 contends that both parties' use of the internet as a marketing channel greatly increases the likelihood of  
14 confusion because it allows competing marks to be encountered at the same time. (*Id.*, citing *Goto.com*,  
15 202 F.3d at 1207.)

16 Defendants, on the other hand, argue that because defendant Martin Meeker does not advertise to  
17 the public or to retailers, the distribution methods for the two parties' products are different. (Motion at 16,  
18 citing M. Meeker Decl., ¶ 19.) Defendants therefore summarily contend that it is undisputed that the  
19 marketing channels do not merge.

20 There is certainly a dispute over whether the two Meeker Vineyards advertise in overlapping  
21 marketing channels. Because the Court finds that the products are sufficiently similar to be considered  
22 related goods for purposes of an infringement analysis, the Court also can appreciate that there is a  
23 significant possibility that the two parties market through similar channels. The factor is certainly material  
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25 <sup>4</sup> Even if Plaintiff had introduced affidavits of some of the persons identified in his declaration (for  
26 instance, the potential wine distributor in paragraph 32 of Charles Meeker's Declaration), such evidence carries  
27 de minimus evidentiary weight in determining whether a trademark has acquired secondary meaning, and cannot  
28 defeat a defendant's motion for summary judgment. *See, e.g., Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 910 (9th Cir. 1995) (holding that declarations from interested parties, such as plaintiff's employees and wholesalers, have little probative value regarding the assessment of consumer perception because they are not impartial and do not necessarily reflect the views of the purchasing public).

1 and is still in dispute. Therefore, the Court does not find the factor weighs in either party's favor, but rather  
2 that the disputed evidence should properly be considered by the finder of fact.

3 **f. Types of Goods and Degree of Consumer Care.**

4 When goods are expensive, it can be assumed that buyers will exercise greater care in selecting  
5 their purchases. *Sleekcraft*, 599 F.2d at 353. It is also established that "[s]imilar trademarks are more  
6 likely to result in confusion when the products at issue are of relatively low cost, where buying decisions are  
7 made quickly and without extensive study, and where certain consumers are not sophisticated." *E. & J.*  
8 *Gallo Winery v. Pasatiempos Gallo*, 905 F. Supp. 1403, 1413 (E.D. Cal. 1994). In addition, "wine is a  
9 product whose quality is accepted by many simply on faith in the maker. They can perhaps identify the  
10 vintner better than the wine." *Taylor Wine Co., Inc. v. Bully Hill Vineyards, Inc.*, 569 F.2d 731, 733 (2d  
11 Cir. 1978). Plaintiff contends that in the labels submitted by defendants, the Meeker Vineyard mark  
12 appears on the bottle, without explanatory phrasing. (Opp. Br. at 15, citing M. Meeker Decl., Exh. B;  
13 Cross-Motion at 22.) Defendants contend that the only time the parties' businesses met in the marketplace  
14 are the few instances in which the defendant wineries have added the defendant 'Meeker Vineyards' mark  
15 to the back label of the wine or in small letters on the front label to state where the grapes used for that  
16 particular wine were grown. (Motion at 17.) Whether an educated and sophisticated wine consumer or a  
17 casual purchaser of wine would recognize the difference between the parties' products is uncertain.

18 This factor is material and still remains in dispute. It is not altogether clear from the evidentiary  
19 submissions made by both parties the exact cost of the competing wines in the market. The range of prices  
20 for the various varietals and years differs and, without having been provided a market context in which the  
21 prices of wines are situated, it is difficult to assess the degree of consumer care exercised in the purchase of  
22 these products. Again, the Court does not find the factor weighs in either party's favor, but rather that the  
23 disputed evidence should properly be considered by the finder of fact.

24 **g. Intent of Defendant in Selecting Infringing Mark.**

25 A party claiming trademark infringement need not demonstrate that the alleged infringer intended to  
26 deceive consumers. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 157-58 (9th  
27 Cir. 1963). However, when the alleged infringer knowingly adopts a mark similar to another's, the Court  
28 can presume that he intended to deceive the public. *Sleekcraft*, 599 F.2d at 254. Evidence of "deliberate

1 copying is relevant to a determination of secondary meaning. Indeed, under appropriate circumstances,  
2 deliberate copying may suffice to support an inference of secondary meaning." *Fuddruckers*, 826 F.2d at  
3 844. "[Plaintiff] would have us go further, and hold that evidence of deliberate copying shifts the burden of  
4 proof on the issue of secondary meaning. We decline to so hold." *Id.*

5 In this matter, Plaintiff contends that when Defendant Martin Meeker discovered that Plaintiff, with  
6 whom he shares a common surname, established a successful winery, he subsequently decided to adopt the  
7 same name by using the same mark in the same industry. Thus, Plaintiff argues, Defendant Meeker's  
8 knowing adoption of the mark constitutes bad faith. (Opp. Br. at 16.) Defendant, however, asserts that he  
9 had no improper intent in its selection of the mark and only chose the mark to identify the products by use  
10 of his own surname as he had done with his own past businesses. (Motion at 19, citing M. Meeker Decl.,  
11 ¶¶ 5-6.)

12 Again, this factor is in material dispute. It is not clear what motivated Martin Meeker to chose to  
13 use his own surname to identify a related product. The Court does not find the factor weighs in either  
14 party's favor, but rather that the disputed evidence should properly be considered by the finder of fact.

#### 15 **h. Expansion of Product Lines.**

16 A strong possibility of expansion into competing markets weighs in favor of a finding of  
17 infringement. *Sleekcraft*, 599 F.2d at 354. Here, however, the Court has found that the products, wine  
18 grapes and wines, produced by both parties, already compete in the market. The parties do not contest the  
19 further application of this factor and the Court finds that it does not weigh significantly in either party's favor.

#### 20 **D. Remaining Related Claims.**

21 The standard for Lanham Act trademark infringement claims is "substantially congruent" to the  
22 standard for Lanham Act unfair competition and the California state law claims for trademark infringement  
23 and unfair competition claims under California Business and Professions Code Section 17200. *Glow*  
24 *Industries, Inc. v. Lopez*, 252 F. Supp. 2d 962, 975 n.90 (C.D. Cal. 2002); *Entrepreneur Media, Inc.*  
25 *v. Smith* 279 F.3d 1135, 1153 (9th Cir. 2002). Because the Court has determined that there is a genuine  
26 issue of material fact regarding secondary meaning and likelihood of confusion, neither party is entitled to  
27 summary judgment on the related claims.  
28

1 In addition, because the Court does not make any finding as a matter of law on Defendants' intent  
2 in adopting the mark, the Court DENIES Defendants' motion for summary judgment with regard to the  
3 fourth claim for cancellation of trademark due to fraud.

4 **E. Liability of Defendant Wineries.**

5 The co-defendant wineries argue that they should be dismissed from this suit on alternative grounds.  
6 In particular, the wineries contend that the Fair Use Doctrine and the First Sale Doctrine bar their liability  
7 here.

8 **1. Fair Use Doctrine.**

9 The Fair Use Doctrine refers to use "otherwise than as a mark . . . which is descriptive of and used  
10 fairly and in good faith only to describe the goods or services of such party, or their geographic origin." 15  
11 U.S.C. § 1159(b)(4). To prevail on their fair use defense, the co-defendant wineries need to demonstrate  
12 that: (1) the mark, 'Meeker Vineyards,' was used in a non-trademark use; (2) the phrase is merely  
13 descriptive of their goods or services; and (3) they used the phrase "fairly and in good faith" only to  
14 describe their goods or services. *See id.* Use "otherwise than as a mark" means a use that is not meant "to  
15 identify the source of the goods," i.e., that it is not used as a trademark, as defined in 15 U.S.C. Section  
16 1127.

17 Here, the co-defendant wineries contend that they were simply complying with a contract term with  
18 Defendant Martin Meeker requiring the addition of his name and source of the grapes to the wine label, as  
19 well as citing the appellation or geographical source of the grapes used in their wine, as is custom in the  
20 industry.

21 Using the name 'Meeker Vineyards' to designate the producer of the grapes and the source of the  
22 grapes used is the very essence of use as a mark. Intent to confuse is not a necessary element of the  
23 violation, but rather to establish a trademark infringement or an unfair competition claim under the Lanham  
24 Act, Plaintiff must only establish that defendants are using a mark confusingly similar to Plaintiff's valid,  
25 protectable trademark. *See Brookfield Communications v. West Coast Entertainment Corp.*, 174  
26 F.3d 1036, 1059 (9th Cir. 1999). Therefore, the fair use defense is, at this time, without merit.

1                               **2.       First Sale Doctrine.**

2               The defendant wineries contend that the First Sale Doctrine bars any claim for damages against  
3 them. The First Sale Doctrine applies where a purchaser of an article bearing a producer's trademark  
4 decides to resell the article, unaltered and in its original packaging. *Summit Technology, Inc. v. High-*  
5 *Line Medical Instruments Co.*, 922 F. Supp. 299, 307 (C.D. Cal. 1996) (holding that "[o]nce a  
6 trademark owner sells his product, the buyer ordinarily may resell the product under the original mark  
7 without incurring any trademark liability.") "Resale by the first purchaser of the original article under the  
8 producer's trademark is neither trademark infringement nor unfair competition." *Sebastian Int'l, Inc. v.*  
9 *Longs Drugs Stores Corp.*, 53 F.3d 1073, 1074 (9th Cir. 1995). The reasoning behind this rule is that,  
10 once a first sale is made, the producer, having already received payment for the first sale of his product,  
11 may not prevent its resale by claiming trademark infringement. *Summit Technology*, 922 F. Supp. at 307;  
12 *see also Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 140 (1998).

13               Here, Plaintiff did not institute this suit to prevent the defendant wineries from reselling wine he  
14 produced and sold to them. Therefore, the First Sale Doctrine is inapposite and does not as a matter of  
15 law bar the wineries' potential liability.

16                               **F.       Plaintiff's Motion to Strike Defendants' Survey Evidence is Denied.**

17               On reply to their motion for summary judgment, Defendants submitted for the first time their Food  
18 and Beverage Study, a survey of potential consumers with regard to their recognition of the Meeker name.  
19 First, Plaintiff objects to the introduction of Defendants' survey evidence because it was late-filed and on  
20 reply, thereby impeding Plaintiff's right to contest the evidence. Because the Court afforded both parties an  
21 additional two weeks to brief and extension of time to argue the issue of the admissibility of the new survey  
22 evidence, such objection to the lateness of the submission has been fully addressed.

23               Substantively, Plaintiff objects to the introduction of the survey evidence on three bases:  
24 (1) the survey is irrelevant, confusing and a waste of the Court's time; (2) the survey is improper because it  
25 fails to comport with validly scientific methods; and (3) there is no authority to support introduction of the  
26 survey by Defendants for the purpose of disproving, as opposed to establishing the existence of, secondary  
27 meaning.  
28

1 With regard to the contention that the survey is irrelevant and confusing, such blanket objections go  
2 to the weight of the survey, not its admissibility. In addition, the Court was not persuaded, even taking into  
3 account the findings of the survey evidence, that Defendants were entitled to summary judgment on the  
4 issue of secondary meaning.

5 With regard to the contention that the methodology employed by Defendants' expert was invalid,  
6 the Court finds that these challenges, for instance to the scope of the interviewed population or the failure to  
7 thoroughly analyze the data gathered, are challenges that similarly go to the weight of the survey evidence  
8 and not its admissibility. *See, e.g., Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) (holding  
9 that in trademark cases, surveys are admissible as long as they are conducted according to accepted  
10 principles and are relevant); *see also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143  
11 n.8 (9th Cir. 1997) (stating that the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.  
12 579, 591-99 (1993), applies to all expert testimony, including survey evidence and is sufficiently reliable  
13 where it has been conducted according to accepted principles). Plaintiff has not demonstrated that the  
14 survey conducted by Defendants' expert failed to comport with generally-accepted survey principles.  
15 Plaintiff's primary objections are that the population surveyed was overly-inclusive and that the expert failed  
16 to draw reliable conclusions from the evidence gathered. Plaintiff's objections go to the weight of the  
17 evidence, not to its admissibility.

18 Third, Plaintiff contends that survey evidence is not admissible for the purpose of disproving the  
19 existence of secondary meaning, but only for the purpose of affirmatively establishing the existence of  
20 secondary meaning. However, in *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1358 (9th Cir.  
21 1985), the Ninth Circuit favorably reviewed the district court's admission of a survey conducted to support  
22 a finding of no secondary meaning. It is clear that using survey evidence to disprove the existence of  
23 secondary meaning is permissible.

24 Although the Court DENIES Plaintiff's motion to strike Defendants' survey evidence, the Court did  
25 not find the evidence sufficiently persuasive to indicate a lack of secondary meaning as a matter of law.  
26  
27  
28



1 Therefore, the survey evidence, and any arguments as to its weight, may be introduced at trial for final  
2 determination.<sup>5</sup>

3 **CONCLUSION**

4 For the foregoing reasons, the Court DENIES Defendants' motion for summary judgment and  
5 Plaintiff's cross-motion for summary judgment on the ground that there remain genuine issues of material  
6 fact still in dispute. The Court also DENIES Plaintiffs motion to strike Defendant's Food and Beverage  
7 Study and GRANTS IN PART and DENIES IN PART Defendants' objections to the evidence.

8  
9 **IT IS SO ORDERED.**

10 Dated: July 6, 2004

11 /s/ Jeffrey S. White  
12 JEFFREY S. WHITE  
13 UNITED STATES DISTRICT JUDGE  
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28 <sup>5</sup> Plaintiff will not be precluded from moving *in limine* on some other ground that the survey evidence  
should not be presented to the jury.